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SAVE THE AMERICAN RIVER ASSOCIATION, INC.

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September 17, 1999

Lester Snow, Executive Director
CALFED
1416 Ninth Street, Suite 1155
Sacramento, CA 95814

Dear Mr. Snow:

We appreciate the opportunity to provide SARA's comments on the CalFed's Draft Environmental Impact Report on the Bay-Delta Program, June, 1999. Our comments are included in two enclosed documents, Attachment A, which is a summary, and Attachment B, an expanded statement of SARA's concerns.

We also look forward to the opportunity to provide verbal testimony at the hearing scheduled for next week. Thank you.

Sincerely yours,

Alan D. Wade, President
Save the American River Assn., Inc.
Residence: 2916 - 25th Street
Sacramento, CA 95818
Phone: 455-7083

cc: Rick Breitenbach
SARA Board of Directors

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ATTACHMENT A - SUMMARY

- SARA is a grass roots organization founded in 1961 to promote the protection, conservation, and restoration of the lands, waters, and resources of the Lower American River and its Parkway. While our primary concern is the protection of the waters, fish and wildlife resources along with the aquatic and terrestrial eco-systems of the American River Parkway, our concerns must also include the totality of the Bay-Delta system. SARA has witnessed the impacts to the Lower American River and its resources by agencies trying to meet demands elsewhere in the state, particularly south of the Delta.

- We believe than any water use and management plan must have as its priority greater protection of stream flows to conserve and restore public trust interests and beneficial uses of the State's waters, rivers, and estuary ecosystems. We believe that such a priority would lead to water conservation, wise use of water and protection of the public trust interests in the area of origin.

- SARA further endorses and reaffirms the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands, believing that this duty should only be set aside in those rare cases when its abandonment is consistent with the purposes of the public trust. The basis for this affirmation is found in a variety of court decisions, including Racanelli and Audubon.

  The core of the public trust doctrine is that the State must administer its interests consistent with trust purposes and values. The duties imposed upon the State are those of a trustee, not those of a business manager trying to cut a deal.

- SARA believes that any water use and management program should emphasize a policy of maximum water conservation, and should include at least the following:

  1. Conserving the natural water supply, both surface and ground water.
  2. Conserving the quality of that water supply, including its integrity and the uses and values associated with it.
  3. Conserving, protecting, and restoring water quality to provide for the greatest re-use capabilities. Protection of water quality enhances the capability for re-use, thereby increasing the available supply for all uses.

- SARA urges that all agricultural water rights and water contracts be reviewed and evaluated for their "economic" or "allocation" efficiency. This includes "irrigation efficiency." Such an evaluation should include the users obligation to protect and conserve, (for future generations) all instream or in place beneficial uses of water, thereby enhancing the non-dollar as well as dollar values of instream uses.

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- SARA believes that it should be CALFED's policy to give first priority to instream uses of water in all water use determinations. Certain levels of the historic natural flow should be reserved for ecosystem maintenance, and these flows should be considered essentially inviolate. The Judge Hodge physical solution/decision in EDF v. EBMUD, 1990 - (Superior Court - Alameda County, No. 425955, January, 1990) demands that level of protection for the Lower American River. Similar flow standards should be developed and held as inviolate for other rivers and streams, rather than simply negotiated in order to satisfy the conflicting demands of stakeholders.

- SARA further urges that FISH and GAME Code Section 5937 which requires "good condition" criteria for fish and other aquatic life downstream from existing dams, be the guiding principle for establishment of stream flows for the protection of cold water regimens necessary to propagate, conserve, and protect anadromous fishes such as Chinook salmon, steelhead, and resident trout.

- SARA believes that all projects and all water rights holders on all streams have a responsibility to contribute their Fair Ecological Share ("FES") to protect, conserve and restore instream resources and the uses and values protected by the public trust.

- In conclusion, SARA believes that all diverters as well as dischargers (agricultural/domestic water users, should understand (1) the usufructuary nature of water, that is, consider the common good, (2) that a water right is not vested, but can be regulated by the State at any time to protect the interests covered by the public trust, and (3) the powers of the State as trustee are implied and include all actions necessary to the execution and proper administration of the trust.

- SARA, along with other conservation and environmental organizations, will make every effort to see that the above concerns are addressed, and urges that CALFED give the most careful attention to our concerns in your continuing deliberations.

ATTACHMENT B - Expanded version of SARA's concerns

These are the comments of Save the American River Association on the Draft Programmatic Environmental Impact Statement / Environmental Impact Report on the CALFED Bay-Delta Program, June 1999.

Save the American River Association (SARA) is a grass roots organization founded in 1961 to promote the protection, conservation and restoration of the lands, waters and resources of the Lower American River and Parkway. SARA's primary concern is the protection of the waters fish and wildlife resources along with aquatic and terrestrial ecosystems of the American River Parkway. However, our concerns extend throughout the Bay-Delta system. SARA has witnessed the impacts to the Lower American River and its resources by agencies trying to meet demands elsewhere in the State, particularly south of the Delta.

SARA believes that any water use and management must have as its priority greater protection of stream flows to conserve, and restore public trust interests and beneficial uses of the State's waters, riverine and estuarine ecosystems. SARA also believes that such a priority would lead to water conservation, wise use of water and protect public trust interests in the area of origin, while the water is being conveyed, during extraction or diversion, during its out-of-stream use and when it returns to either the surface or ground waters of the State.

Some specific comments:

CALFED reports have an underlying thread that northern California (Sacramento Basin) has a large surplus of water. Has CALFED conducted a study based on today's public trust laws and court decisions to determine just what the agricultural, urban and environmental water needs are including that necessary to meet Delta water quality and outflow standards? CALFED appears to have ignored the local and regional needs in favor of export demands. When Northern Californians need that water for urban and agricultural uses, environmental needs and to restore the fisheries and water quality of area of origin streams and rivers, they will learn that corporate agriculture, as it has developed in the San Joaquin Valley, have assured long contracts to that water. At that time Northern Californians will have to buy the water, at astronomical prices, or fight among themselves over the Wild and Scenic Rivers for their needed water. Interestingly though, according to Audubon there is no compensation for water needed to restore or protect resources, uses or interests covered by the public trust doctrine.

The CALFED proposal is heavily dependent upon new facilities to store and convey water from northern California to the thirsty semi-desert soils of the southern and western San Joaquin Valley. SARA believes that no additional storage facilities should be approved until Federal, State and local water agencies fully implement effective demand management, water conservation, and water use efficiency practices for all agricultural and urban water users. RESTORATION BEFORE CONCRETE. In addition any new storage should be paid for by the beneficiaries of that water not the environment or the taxpayer. The costs of new water has been estimated at $500 to $3,500 per acre foot. Conservation can bring in real water at a far cheaper cost.

The Central Valley is the largest user of developed surface and groundwater in the State. Yet there are hundreds of thousands of acres that do not meet the criteria of good agricultural soils. A long growing season, cheap or subsidized water and agricultural chemicals all combine to produce a crop. Long term impacts to the soil downslope or downstream ecosystem appear to be of little concern. The San Joaquin River has been changed from a calcium-sodium bicarbonate type, suitable for all beneficial uses to one continuously degraded by drainage containing trace elements and a variety of salts, irrigation wastewater, to one of sodium- sulfate -chloride type which adversely affects many of the private and public beneficial uses of water not the least of which is the renewability of the basin's fish and other aquatic resources covered by public trust protection. Every effort must be made to implement water quality goals as standards and enforced accordingly.

The best or prime farmlands are those lands having the best combination of physical, chemical and biological features for the production of agricultural crops Soils known to have trace element, salt problems or drainage problems should not be irrigated except under very restricted conditions and some should not be irrigated at all. Taking the selenium laden soils out of irrigation production (at least 500,000 acres) would save about 2.0 to 2.5 acre feet per acre and greatly reduce the drainage / salt/ selenium burden on the San Joaquin River and Delta. The irrigation water so saved 1MAF up to 2.5 MAF, a portion (half) could be used to assure a reliable supply for the best soils, with the remainder used to restore resource renewability and water quality to the river and stream of the state.

Delta inflow is 24 MAF, based on simulated historical hydrology, but with existing storage and conveyance in place (p10 Revised Phase 11 Report). What is the Delta outflow under the same scenario? Is the 5.9 MAF of the Delta inflow that is exported a part of the Delta inflow? If so, what is the actual outflow, 24 MAF -5.9 MAF = 18.1 MAF? Is this correct? DWR 1987 estimated Delta inflow at 29.580 MAF and an outflow of 28.389 MAF. The difference being in Delta use. The reduction to 18.1 MAF Delta outflow is about 63 to 64 percent of the unimpaired Delta outflow.

The understanding one gets from the literature is that when more than 30 to 35 percent of the flows are diverted from an estuary, the productivity of that estuary, its resources and the renewability those resources are severely impacted; water quality is drastically reduced and there are a significant impacts to many beneficial uses of that estuary. From a look at the data, water exports and instream depletions already are above 30 percent in normal runoff years and far exceed that during years of dryer than normal runoff.

According to information about 20 percent of the developed water goes to crops producing less than 5 percent of agricultural revenues. In a water short situation irrigated pasture / alfalfa is not an example of a prudent use of water in the arid and semi-desert climate.

How much of Delta inflow is the result of drainage from groundwater derived supplies and how much is drainage resulting from surface water imported to the San Joaquin Basin ?

Regarding water quality how much of the San Joaquin Rivers water quality / salt / sediment / selenium trace element problems are the result of or caused by imported irrigation supplies to irrigate the west side of the San Joaquin Valley?

Through demand management, the more existing water supplies can be stretched through more efficient use, reuse, reclamation, and reduction of waste in a wide range of economic activities including product, services, agricultural crops and manufactured foods and electrical energy, the more likely instream resources, uses and values can be conserved and protected and their restoration potential realized.

The 4 alternatives presented all require up to 3 MAF of surface or groundwater storage; up to 2.MAF of near Delta or south Delta storage and up to 500 TAF of surface storage and 500 TAF of groundwater storage in the San Joaquin Valley. The BIG issue is going through the Delta via a modified waterways system to convey northern California and Sacramento River water to the thirsty pumps in the south Delta. Already according to the CALFED Priorities for FFY 2000, CALFED needs to make definitive progress regarding south Delta and North Delta water management improvements, i.e. to better move Sacramento river water to the export pumps. All this is before the Public's comments are in. Isn't this putting the peripheral canal cart before the horse?

Detailed Discussion / Support for SARA's Concerns

California Court in National Audubon Society v. Department of Water and Power, City of Los Angeles (33 Cal 3d 419, 658 P 2d 709 -1983) (Audubon) stated that the public trust is more than affirmation of State's power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands surrendering that right of protection in rare cases when abandonment of that right is consistent with purposes of the trust.

In United States v. State Water Resources Control Board (227 Cal Rptr. 161 (Cal. App 1 Dist. 1986) also called the Racanelli Decision), the California Court re-emphasized much of the past rulings of the California Supreme Court regarding the State's public trust responsibilities. This ruling also clarified other things. For example, (1) All water rights are subject to government regulation and continuing authority; (2) The State Board must provide reasonable protection for all beneficial uses of water (protect public trust interests), not just those uses covered by water rights allocation; (3) No party has a vested right to appropriate water in a manner harmful to interests protected by the public trust; (4) The State Board is not confined by past allocation decisions that in any way may be incorrect or improper in light of current knowledge and is free (has an obligation) to reexamine previous allocation decisions; and (5) the State Board must take a global look at the entire Central Valley water allocation (all tributaries to the Delta) and all uses of water uses up stream of the Delta.

SARA endorses the meaning of public trust protection as described in Audubon and the findings and instructions of Racanelli. SARA also believes that the core of the public trust doctrine is that the State must administer its trust interests consistent with trust purposes and values. The duties imposed upon the State are those of a trustee and not those of a business manager trying to cut a deal. The key to carrying out the public trust duties are the powers to regulate as well as the powers to protect the State's fundamental rights in trust properties and the public use of those properties.

Water Conservation

SARA believes that any water use and management program should have a policy of maximum water conservation. That policy should include at least the following:

1. Conserving the natural water supply. This includes the integrity of that water supply and the resources, uses and values associated with that water source (both surface and ground water).

2. Conserving the quality of that water supply - this includes protecting that water supply against man-made and natural adverse impacts such as silt, salts, trace elements, chemical, temperature, etc.

3. Conserving, protecting and restoring water quality to provide for the greatest re-use capabilities. Such a program should strive for the greatest diversity of beneficial uses that are consistent with and protect water quality.

Stretching the water supply depends on (1) how the water is used, (2) where the water is used, (3) what it is used for, (4) how the water interfaces with natural and man induced additives and (5) the reclamation costs to restore water quality for its reuse or disposal to meet water quality standards to protect social, economic, natural resource, products, uses and values. The more water quality is protected the greater the capability for water reuse, thereby increasing the available water supply for all uses.

The more existing water supplies can be stretched through demand management, efficient use, reuse, reclamation, and reduction of waste in a wide range of economic activities including product manufacture, services, agricultural crops and processing foods and electrical energy, the more likely instream resources, uses and values can be conserved and protected and their restoration potential realized.

SARA believes that the present Evapo-Transpiration (E-T) calculation are an out dated measure of water efficiency. Changes in irrigation practices, i.e sprinkler irrigation, drip irrigation, underground watering systems have made great strides in getting the needed water to the respective crops. What is the real transpiration of a crop under such conditions compared to flood or row irrigation? Supplemental irrigation water should be measured by the acre inch not by the acre-foot. When the supplemental water supply is the only real water supply available, it is poor water management and not in the State's nor public interest.

SARA also believes that all agricultural water rights and water contracts should be reviewed and evaluated for their "economic" or "allocation" efficiency. This review should go beyond the traditional evaluation of "irrigation efficiency". This evaluation should include the contractor's, applicant's or licensee's obligation to protect and conserve (for present and future generations), all instream or in place beneficial uses of water, water quality and the renewability of fish and wildlife populations dependent upon such waters as an ecosystem. It should include using water to protect and enhance non-dollar as well as dollar values of instream uses. This would include both regional and statewide concerns for non-dollar values of the beneficial uses of instream or in place water. It would include meeting water needs at the least cost over time. The areas of origin, their resources and their long-term social, economic and environmental interests should be given priority. It should include using water for beneficial uses to help support reasonable economic stability in the areas of origin not just the export area.

Instream Flows / Ecosystem Restoration

SARA believes that CALFED should implement a policy that instream uses of water are to receive priority in all water use determinations. In addition certain levels of the historic natural flows should be reserved for non-consumption instream uses such as ecosystem maintenance and resources renewability. This flow should be considered essentially "inviolate", as common property owned by all the people and generations yet unborn. SARA also believes that the biological or environmental death of a stream, river or other waters are not negotiable. SARA supports the concept of "inviolability" and believes that it should be adopted as the guiding policy for protecting instream flows, associated resources and ecosystems. SARA believes that the Judge Hodge physical solution / decision in EDF v EBMUD -1990 is that level of protection for the Lower American River.

SARA, exclusive of the Lower American River (Hodge decision of EDF v EBMUD - 1990), does not know of any instream flow standards developed under public trust principles that have been adopted for other Central Valley rivers and streams by CALFED to meet all the resources, uses and values protected by the public trust. Most of the stream flow release schedules were either dictated by strong stake-holders or negotiated to protect diverters' interests and approved by State and Federal trustees under political orders (i.e. the EBMUD / CDFG / FWS settlement for the FERC license to EBMUD for its Mokelumne River projects) .

Groundwater

SARA believes that areas of critical ground water overdraft should have ground water management programs as rapidly as possible. Reasons for bringing ground water under regulation include to protect water quality, to prevent waste and unreasonable uses and to provide for comprehensive and integrated management of our farmland soils and conjunctive use of surface and ground watering supplies. In the past over drafting the groundwater was used as justification for bringing in cheap / subsidized water. All to often the result was continued overdrafting of the same groundwater pool and expanded acreage under irrigation. SARA believes that the policy of "inviolability" of stream flows should be firmly in place before conjunctive use (surface and ground water) can become a viable management tool without harming instream trust interests, uses and values. Demand management and conservation practices must be in place before a conjunctive use effort is implemented.

Water Quality

SARA believes that water quality goals should be equal to standards. SARA supports a policy that all discharges should be consistent with the preservation of the maximum public benefit, (resources, uses and values) of the receiving waters. If existing water quality exceeds the water quality objective, the existing quality should be recognized as the standard. Any justification to reduce water quality to a lesser standard must be demonstrated to be in the public interest, consistent with public resources, uses and values of the receiving waters protected by the public trust doctrine, not for the convenience of a discharger.

It is also important that all discharges be monitored to quantify the amount of variance between the waste discharge standard (timing, temperature or chemical parameters) and what actually happens. The concept of Total Maximum Daily Loading (TMDL) plays on the idea that the regulators can control a little bit of pollution and its multi-faceted or synergistic impacts. That is like controlling a pregnancy after conception. Both will take draconian efforts if control is necessary.

Reservoir Operations

The provisions of Title 23, Section 782 of the California Administrative Code, the Fish and Game Code Section 5937 and the State Board Term 69 to "at all times – allow sufficient water to pass downstream to keep in good condition any fish that may be planted or exist below the dam" are important expressions by the State for protecting the public's fish trust.

SARA believes that the effect of Fish and Game Code Section 5937 is to limit the amount of water that may be appropriated or extracted from a river or stream, by requiring that sufficient water first be released to provide habitat conditions to assure that fish and other aquatic life below the dam are maintained in good condition.

Though "in good condition" criteria is not defined in Section 5937, "good condition" includes the health and renewability of the entire aquatic ecosystem and its component parts. From a public trust prospective, it includes the physical (water, stream bed and shore lands), biological (flora and fauna), and the chemical parameters (water quality) that are necessary to support self-maintaining or renewing fish populations, aquatic life and ecological values and other beneficial uses. Fish and Game Code Section 45 defines "fish" as wild fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn or ova thereof."

The guiding principles of "good condition" are discussed in Cal Trout v State Water Resources Control Board (207 Cal App. 3d 585 - 1989). The criteria for fish in "good condition" has been established by case law and included in some State Board staff reports and Orders. It includes 1) the health of individuals, i.e. fish are healthy , free of disease, parasites, etc, and have reasonable growth rates with adequate habitat; 2) diversity and abundance of aquatic populations, diversity of age class, sufficient habitat to support all life stages and support self-sustaining populations; 3) the community, its overall health including co-evolved species and the health of the aquatic ecosystem at several trophic levels. (See Bear Creek - SWRCB Order 95-4 at 18 to 22, 1995; Putah Creek v. Solano Irrigation District, Sacramento Superior Court No. CV515766, April 1996; State Board Order WR 95-17, Lagunitas Creek, October 1995.

SARA believes that larger minimum pools are needed in most reservoirs and particularly those over 100,000 acre-feet capacity. A properly sized minimum pool could increase the effectiveness of any temperature control facility needed to help provide a cold water release regimen necessary to propagate, conserve and protect anadromous fishes such as Chinook salmon, steelhead and resident trout. In addition such a pool would provide a water source during public health emergencies, to help buffer damage to environmental values and public trust interests during periods of less than normal runoff.

All reservoir owners and all diverters of water have a responsibility to conserve and protect instream flows, uses and values. SARA supports the formulation and implementing of a policy that all reservoir operations and attendant flow regimen releases, to the maximum extent possible, be consistent with instream ecosystem protection, resource renewability and resource restoration. The flow regimen released should strive for maximum long term instream benefits. Any release of stored water for transfer should be coordinated to maximize the ecological values and biological resources and uses protected by the public trust.

SARA believes that the implementation (along with enforcement) of such a policy would assure that pollution or nuisance problems would not occur, that the highest water quality consistent with maximum benefits to the public will be maintained, and that resources, uses and values covered by the public trust will be protected.

Integrated Farmland Soils and Water Management

SARA believes that the productivity of the State's best farmland soils should be protected against degradation. The best or prime farmlands are those lands having the best combination of physical, chemical and biological features for the production of agricultural crops (Federal Register. Vol. 3, No. 21, January 31, 1978). For example those soils known to have or contribute to the trace element, salt problems or drainage problems would not be irrigated except under very restricted conditions.

The management of the State's farmland soils and water resources should be based on ecological parameters and on the renewability of ecosystem components such as water, soil, vegetation, fish and wildlife. Capabilities and constraints of the land/soils would be balanced against the unreasonable use of water or unreasonable method of use. This should provide for greater efficiency of both the water and soil resources as well as protect downslope or downstream resources, uses, and values.

SARA supports a program that integrates the land/soil capabilities and limitations with a conjunctive water use and management programs of a farm or farm unit. This program should be pre-requisite for all lands receiving imported (out of basin) water.

Cumulative Impacts Must be Identified

Each and every stream provides many benefits, uses and values free of charge as their waters flow to the ocean or other terminal body. Some CALFED member agencies, in the past, have been instrumental in watching streams dry up or their water so contaminated with point and non-point discharges that they are unfit for most beneficial uses. CALFED now recognize that the cumulative impacts of both the construction and operation of the State's many water projects are having a major impact on ever diminishing resources.

SARA believes that all projects and all water right holders on all streams have a responsibility to contribute their Fair Ecological Share (FES) to protect, conserve and restore instream resources uses and values protected by the public trust. The meaning of "FES" is that every stream and every water right holder has an obligation to contribute its fair share of the water needed to provide the stream flows and environmental conditions necessary to preserve, restore, and protect trust resources and interests from a streams headwaters, through its length, to contribute to Delta inflow and Delta outflow (i.e. to the Pacific Ocean).

If each project and water extraction activity contributed its FES to instream flows uses and values, the problems associated with protecting and restoring ecosystem renewability, aquatic resources, protecting wetlands and water quality would be greatly reduced. SARA believes that the Judge Hodge physical solution / decision in EDF v EBMUD -1990 is that level of protection for the Lower American River.

Conclusion

SARA believes that all diverters as well as dischargers (agricultural / industrial / domestic water users) should already understand, (1) the usufructuary nature of water (they must consider the rights and interests of other users and interests), (2) that a water right is not vested, but can be regulated by the State, at any time, to protect interests covered by the public trust, and (3) the powers of the State as trustee are implied and include everything necessary to the execution and proper administration of the trust. See People v. California Fish Company (66 Cal 576, 138 pacific 79 87, 88 - 1913) Long Beach v. Mansell (476 Pac. 2d 423, 3 Cal 3d 462-1970).

The Save the American River Association, along with other conservation and environmental organizations will make every effort to see (through negotiations and lawsuits if needed) that the above concerns are addressed and or implemented to restore, conserve and protect the rivers and streams of the Bay -Delta watershed for all its beneficial uses protected by the public trust doctrine.